

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCHREINER FARMS, INC.,

Plaintiff,

v.

AMERICAN TOWER, INC., a
Delaware Corporation; NEXTEL
WEST CORPORATION, INC. d/b/a
NEXTEL COMMUNICATIONS, a
Delaware Corporation; TOWER
ASSET SUB INC., a Delaware
Corporation; SPECTRASITE
COMMUNICATIONS, INC., a
Delaware Corporation; and
WESTERN OREGON WIRELESS
COMMUNICATIONS, INC., an
Oregon Corporation, and
WASHINGTON OREGON
WIRELESS, LLC, a Washington
Limited Liability Company,

Defendants.

NO. CV-09-3083-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION TO
REMAND**

Before the Court is Plaintiff's Motion to Remand (Ct. Rec. 8). The hearing on the motion was held on October 30, 2009, in Spokane, Washington. Plaintiff was represented by Marie Kagie-Shutey; Defendants American Tower, Inc., Spectrasite, and Tower Asset were represented by Raymond Clary. Defendants Nextel West and Western Oregon Wireless were represented by Robert Tenney, who participated telephonically. The hearing was held in the judge's chambers.

Plaintiff Schreiner Farms, Inc. filed its complaint in Klickitat County Superior Court on July 28, 2009. On August 31, 2009, Defendants American

1 Tower, Tower Asset Sub, Inc. and Spectrasite, Communications removed the case
2 to the Eastern District of Washington. Defendant Nextel West and Washington
3 Oregon Wireless joined in the remand. On September 18, 2009, Plaintiff filed a
4 Motion to Remand.

5 **BACKGROUND FACTS**

6 This case arose out of a lease dispute. Plaintiff owns a parcel of land in
7 Klickitat County, Washington. Plaintiff entered into a lease agreement with
8 Nextel. The lease provided that Nextel could erect, maintain and alter premises
9 solely for Nextel's business operations. Defendant Nextel erected a tower for its
10 purposes. Defendant Tower Asset and/or Spectrasite subsequently installed a
11 second equipment array on the tower without Plaintiff's knowledge or consent and
12 then Tower Asset and/or Spectrasite subsequently subleased the second equipment
13 array to Defendant Western Oregon Wireless, another communication provider.
14 Upon request, Plaintiff conveyed a license to Western Oregon Wireless because it
15 believed that this company was an affiliate of Nextel. According to Plaintiff,
16 Western Oregon Wireless is not related to Nextel.

17 In its original complaint, Plaintiff alleged that Defendant Nextel defaulted on
18 the original lease agreement. It then sought permission to file an Amended
19 Complaint, which was granted in the superior court. The Amended Complaint
20 sought to add Washington Oregon Wireless as a Defendant. In paragraph 9, the
21 complaint stated:

22 9. This cause of action involves a lease of real property in
23 Klickitat County. Accordingly, venue is proper in the Klickitat
24 County pursuant to RCW 2.08.210 and 4.12.010. Said property is
within the jurisdiction of and subject to the land use restrictions
imposed by the Columbia River Gorge National Scenic Area.

25 The amended complaint also added a new allegation and a new claim for
26 relief. The new allegations is as follows:

27 On or about May, 2009, Plaintiff was informed that the
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1 Columbia River Gorge Commission,¹ with authority to regulate the
2 use of property including the property at issue in this case has
3 threatened to commence legal action against Defendant SpectraSite,
4 Inc., Defendant Nextel and others involved with the obtaining the
original permits for construction of the monopole and other equipment
on Plaintiffs [sic] property and adding a second equipment array
without permits for violation of the terms of the original permit.

5 Plaintiff also requested declaratory judgment that Defendants were not
6 authorized to use the premises without obtaining all Government and agency
7 required permits, that such permits were not obtained, and that a default under the
8 lease provisions exists.

9 Based on these changes, Defendants removed to Federal Court and Plaintiff
10 promptly filed a Motion to Remand.

11 DISCUSSION

12 Under 28 U.S.C. § 1441(a), any action brought in a state court of which the
13 district court would have original jurisdiction may be removed to the district court.
14 Congress has given district courts original jurisdiction over cases concerning
15 questions of federal law. 28 U.S.C. § 1331 (“[D]istrict courts shall have original
16 jurisdiction of all civil actions arising under the Constitution, laws, or treaties of
17 the United States.”). Under *Franchise Tax Bd. v. Construction Laborers Vacation*
18 *Trust*, 463 U.S. 1 (1983), the Supreme Court recognized that “even though state
19 law creates the causes of action, the case might still ‘arise under’ the laws of the
20 United States if a well-pleaded complaint established that its right to relief under
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23 ¹The Commission is empowered by the Columbia River Gorge Act, which
24 creates a commission to protect the economy and enhance the scenic, cultural,
25 recreational and natural resources of the Columbia River Gorge. 16 U.S.C. § 544.
26 The Act empowers a commission, made up of count representatives within Oregon
27 and Washington, to create plan and enforce it through the respective state agencies.
28 *Id.* The Act also provides for Federal jurisdiction over criminal penalties or
violations of orders imposed by the secretary pursuant to the Act itself. *Id.*

1 state law requires resolution of a substantial question of federal law in dispute
2 between the parties.” *Id.* at 13. Nevertheless, “[t]he mere presence of a federal
3 issue in a state cause of action does not automatically confer federal-question
4 jurisdiction.” *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810-11
5 (1986). Additionally, parties cannot confer subject matter jurisdiction by
6 agreement. *Morongo Band of Mission Indians v. California State Bd. of*
7 *Equalization*, 858 F.2d 1376, 1379 (9th Cir. 1988). The well-pleaded complaint
8 rule provides that “federal jurisdiction exists only when a federal question is
9 presented on the face of the plaintiff’s properly pleaded complaint.” *Balcorta v.*
10 *Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000).

11 The removal statute is “strictly construed, and any doubt about the right of
12 removal requires resolution in favor of remand.” *Moore v. Alaska Airlines, Inc.*,
13 553 F.3d 1241, 1244 (9th Cir. 2009) (citations omitted). This presumption against
14 removal imposes the burden of establishing that removal is proper on the
15 Defendant. *Id.* The Court must resolve all ambiguity in favor of remand to state
16 court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). In addition, when
17 “an alternative theory of relief exists for each claim alleged in the complaint, one
18 not dependent upon federal law,” federal question jurisdiction is defeated.
19 *International Union of Operating Engineers v. County of Plumas*, 559 F.3d 1041,
20 1045 (9th Cir. 2009).

21 Here, in its Amended Complaint, Plaintiff asks for the following relief:

22 1. Declaratory judgment that Defendant Nextel was not authorized
23 to assign the lease to Defendant Tower Asset because Defendant
24 American Tower, SpectraSite and Tower Asset do not provide radio
communications services, and therefore, a default exists under the
lease.

25 2. Declaratory judgment that Defendants American Tower,
26 SpectraSite, and Tower Asset were not authorized to sublease the
27 premises to Washington Oregon Wireless because Defendant
28 American Tower, SpectraSite and Tower Asset did not obtain
Plaintiff’s voluntary and knowing consent, so that a default exists
under the lease.

3. Declaratory judgment that Defendant Western Oregon Wireless

1 were not authorized to use premises based upon the sublease that was
2 executed with Plaintiff's voluntary and knowing consent, so that a
default exists under the lease.

3 4. Declaratory judgment that all Defendants were not authorized
4 to use the Premises without obtaining and complying with all
5 Government and agency-required permits, restrictions and conditions,
and that Defendants did not obtain such permits and did not comply
with the restrictions and therefore a default exists under the lease.

6 It is clear to the Court that in order to determine whether Plaintiff is entitled
7 to its first three requests for relief, the Court will not need to resort to federal law.
8 Rather, the Court will be construing the lease. With respect to the fourth request
9 for relief, however, in order to determine whether Plaintiff is entitled to relief for
10 this claim, the Court will need to consult federal law in order to determine whether
11 it was necessary to obtain a permit. The Court will look to the lease to determine
12 whether under the lease it was necessary to obtain the permits, but if the Court
13 finds that the lease so requires, it will be necessary to consult federal law to
14 determine whether Defendants obtained the necessary permits as required by
15 federal law. On the other hand, the Court believes that the question as to whether
16 Defendants complied with the restrictions of the permits will be simply construing
17 the permits and this would not necessarily implicate federal law.

18 Keeping in mind that any doubt about the right to removal requires a
19 remand, the Court does not find that the question regarding whether a permit is
20 required creates a substantial question of federal law. Plaintiff is not seeking relief
21 under the Columbia River Gorge National Scenic Act. Indeed, there is not a
22 private right action under the Act.

23 In *Merrell*, the plaintiffs sought damages on common-law theories of
24 negligence, breach of warranty, strict liability, fraud, and gross negligence, as well
25 as a claim that the alleged "misbranding" of a drug violated the federal Food, Drug,
26 and Cosmetic Act (FDCA) represented a "rebuttable presumption" of negligence
27 and the "proximate cause" of the injuries. 478 U.S. at 805. The Supreme Court
28 held that a violation of a federal statute as an element of a state cause of action,

1 when Congress has determined that there should be no private, federal cause of
 2 action for the violation, does not state a claim “arising under the Constitution, laws
 3 or treaties of the United States” within the meaning of 28 U.S.C. § 1331. *Id.* at
 4 812. Similarly, in this case, Plaintiffs are alleging that the failure to obtain a permit
 5 in violation of the federal law is the cause of breach of the lease, rather than
 6 alleging a federal action under federal law. Plaintiff’s request for declaratory
 7 judgment is “not the kind of adjudication for which jurisdiction would serve
 8 congressional purposes and the federal system.” *See Merrel*, 478 U.S. at 814 (“We
 9 simply concluded that the congressional determination that there should be no
 10 federal remedy for the violation of this federal statute is tantamount to a
 11 congressional conclusion that the presence of a claimed violation of the statute as
 12 an element of a state cause of action is insufficiently “substantial” to confer
 13 federal-question jurisdiction.”). As such, the Court does not have federal subject-
 14 matter jurisdiction over Plaintiff’s breach of contract claims, and remand is
 15 appropriate.

16 ATTORNEYS’ FEES

17 The Court has discretion to determine whether an award of cost is proper
 18 despite finding removal improper and remanding to state court. *Moore v.*
 19 *Permanente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992). “Absent unusual
 20 circumstances, courts may award attorney’s fees under § 1447(c) only when the
 21 removing party lacked an objectively reasonable basis for seeking removal. *Martin*
 22 *v. Franklin Capitol Corp.*, 546 U.S. 132, 141 (2005). If an objectively reasonable
 23 basis exists, fees are not appropriate. *Id.*

24 Here, the Court declines to award fees. The Court does not find that
 25 Defendants lacked an objectively reasonable basis for seeking removal.

26 Accordingly, **IT IS HEREBY ORDERED:**

- 27 1. Plaintiff’s Motion to Remand (Ct. Rec. 8) is **GRANTED**.
- 28 2. The above-captioned case is to **remanded** to the Klickitat County

1 Superior Court.

2 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
3 Order and forward copies to counsel and close the file.

4 **DATED** this 3rd day of December, 2009.

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6 *s/Robert H. Whaley*

7 ROBERT H. WHALEY
8 United States District Judge
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